Senate Standing Committee on Education and Employment Inquiry into Corporate Avoidance of the *Fair Work Act 2009*

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Summary of Recommendations

Our recommendations are summarised below:

1. The employer should be responsible for delivering the training of apprentices and trainees. Therefore, posting a trainee or apprentice to a host company under a labour hire arrangement should be made unlawful under the *Fair Work Act 2009* (Cth) (FW Act) and sufficient penalties should apply in order to provide an effective deterrent.

2. The FW Act should be amended to ensure that workers on fixed term contracts for longer than 24 months are converted automatically to permanent employment unless the employer refuses the conversion on reasonable grounds.

3. The Office of the Fair Work Ombudsman (FWO) has to issue, at a minimum, a policy statement, regarding the application of the 'vocational placement' exception contained within section 12 of the FW Act to bring further clarity on the legality of many vocational placement type arrangements.

4. The FWO has to engage with tertiary education providers, and other relevant government bodies to ensure that students, migrant workers and consumers understand their rights under unpaid internship agreements and are aware of exploitative practices under said arrangements.

5. The FW Act should be amended to provide a statutory definition of 'independent contractor'.

6. There should be an implementation of an effective minimum entitlements scheme for all independent contracting arrangements. This could be achieved by amending the *Independent Contractors Act 2006* (Cth) to provide an effective minimum entitlements scheme for all independent contracting arrangements including, for example, a minimum hourly contractors' fee.

7. There has to be better monitoring of app driven labour arrangements by regulators and legislators.

8. JobWatch therefore recommends that existing provisions around transfer of employment in the FW Act be preserved.

9. The FW Act should be amended to establish a statutory presumption that accrued leave entitlements will be transferred to the new employer on transfer of business;

10. Section 22(5) of the FW Act to clarify that a term of service is continuous for the purposes of unfair dismissal unless clearly and unambiguously excluded by a new employer on transfer of business.

11. The FW Act should be amended to include a requirement that any proposed exclusion of continuous service for the purposes of unfair dismissal be outlined in a document separate to the new employer's contract of service on transfer of business.

12. The FW Act should be amended to include a requirement of a written statement by employers as to the status of an employee's continuity of service on transfer of business.

13. The FW Act should be amended to clarify when a transfer of assets has or has not occurred under the transfer of business provision by providing a definition of the meaning of 'arrangement'.

14. The FW Act should be amended to mandate that a Fair Work Transfer of Business Information Sheet is to be provided to employees by the vendor.

15. The FW Act should be amended to give express recognition of the fact that, for unfair dismissal purposes, two separate entities in a labour hire scenario may be deemed to be joint employers in circumstances where they share or co-determine matters governing employment.

This should extend to situations where labour hire workers are engaged as independent contractors on sham arrangements (where they really are employees) and are placed with host organisations that control their work.

16. The FW Act should be amended to expressly recognise the possibility that in a labour hire scenario (where joint employment does not apply) a host organisation will, in certain circumstances, be deemed to be the true employer for the purposes of unfair dismissal.

17. Employer visa sponsors should be more vigilantly monitored by regulators and legislators alike. There has to be to be greater penalties made available to better deter potential offenders.

18. Temporary migrant workers who lose their sponsorship because they have been dismissed should be entitled to an automatic bridging visa covering the period while they are challenging their dismissal.

19. The Fair Work Commission (FWC) and/or the Federal Court of Australia and the Federal Circuit Court of Australia should have the power to order reinstatement of the employer's visa sponsorship obligations.

20. A specific task force or other arrangement should be set up between the FWO and the Department of Immigration and Border Protection to better protect the work and residency rights of temporary migrant visa workers.

21. There has to be greater emphasis on enforcement of the National Employment Standards (NES) and modern award obligations, including proactive public campaigns.

22. The FW Act should be amended so that the right to request a change to working arrangements be extended to all employees who require flexibility due to the grounds set out in the FW Act, regardless of their length of continuous service. Alternatively we recommend that the right to request flexible working arrangements be available to employees who have completed the minimum employment period applicable in the unfair dismissal provisions of the FW Act. That is, 6 months for employees in business

with 15 or over employees and 12 months for employees in smaller business with 14 employees or less.

23. The FW Act should be amended to remove the reference to 'reasonable business grounds'. This should be replaced with the lone requirement that a refusal to accommodate an employee's parental responsibilities not be unreasonable in the manner prescribed by the *Equal Opportunity Act 2010* (Vic) (EO Act).

24. The FW Act should be amended to make the right to request flexible working arrangements be made a civil remedy provision to ensure its enforceability.

25. The FW Act should be amended to strengthen the FW Act's flexible working arrangements provisions by using the Victorian EO Act and the United Kingdom's *Employment Rights Act 1996* as a model for improvement. Specifically, section 65 of the FW Act should be changed to mirror the flexible working arrangement provisions in the aforementioned Acts.

26. The FW Act should be amended to make the right to apply for an extension of unpaid parental leave, a civil remedy provision. This will go some way to ensure the enforceability of this right.

27. There must be a higher level of regulation surrounding independent contracting in order for the FWO and other regulatory bodies to better prosecute sham contracting. There should be a statutory definition of the term 'independent contractor' in the FW Act.

28. The Commonwealth government should consider or continue to consider legislation similar to the draft *Corporations Amendment (Similar Names) Bill 2012* which proposed amendments to the *Corporations Act 2001* (Cth) that would, in certain circumstances, impose personal liability on company directors for debts incurred by 'phoenix' companies.

29. The FWC/FWO should advise all employees on AWAs of their right to unilaterally terminate their individual agreements after the agreements' nominal expiry date.

30. All AWAs should automatically terminate on a certain date (e.g. 1 January 2017).

31. Section 384 of the FW Act should be amended to recognize all casual service as service for the purpose of eligibility for unfair dismissal.

32. The FW Act should be amended to include a mechanism for conversion from casual to permanent employment for employees with a certain term of service.

33. The FW Act should be amended to make sure that casuals who have been employed on a long term basis (such as at least one year) be entitled to notice of termination and redundancy pay.

34. The FW Act's notice of termination and redundancy pay provisions in the NES should be amended to take into account an employee's prior period of casual service if their job as a permanent employee is made redundant.

i. Introduction

Job Watch Inc (JobWatch) is pleased to contribute to the Senate Standing Committee on Education and Employment Inquiry into Corporate Avoidance of the *Fair Work Act 2009* (FW Act). In this submission, we discuss the impact of corporate avoidance of the FW Act on workers' pay and conditions and we make recommendations which aim to strengthen workers' protections under the FW Act.

This submission focuses on various ways that companies avoid their obligations under the FW Act. We specifically address questions (a), (d), (e), (f), (h), (i), (j) and (l) in the Terms of Reference. We look at the use of labour hire and contracting arrangements that negatively affect workers' pay and conditions, including the avoidance of paying redundancy entitlements by labour hire companies and the ineffective protections provided to labour hire employees from unfair dismissal. We also address the limitations of the transfer of business/employment provisions in protecting workers' pay and conditions and the avoidance by companies of their obligations under the FW Act by engaging workers on visas and entering into arrangements such as sham contracting and phoenix corporate structures. Lastly, we address leftover issues relating to Work Choices and AWAs and the impact of casualisation on the workforce.

ii. About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

a) provide information and referrals to Victorian workers via a free and confidential Telephone Information Service (TIS);

b) engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;

c) represent and advise vulnerable and disadvantaged workers; and

d) conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected approximately 181,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available to them at any given time. JobWatch currently responds to approximately 10,000 calls per year.

The contents of this submission is based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice. Case studies

have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies which we have used are those of actual but de-identified callers to JobWatch's TIS and/or legal practice clients.

Statistical Analysis

The following information provides an overview of the employment status, coverage and union membership of callers to JobWatch over the past 2 years. It shows the vulnerability of many of our callers and the precarious nature of their employment.

Table 1: Employment status of callers to JobWatch in the period of 1 July 2014 to 30 June 2016

Employment Status	Count	Percentage of total calls
Casual Part Time	1,243	8.21%
Casual Full Time	729	4.82%
Independent Contractor	407	2.69%
Fixed Term Contract	259	1.71%
Apprentice/Trainee	208	1.37%

The above table demonstrates that 1,972 callers identified as casual employees, 407 callers identified as independent contractors, 259 callers were on fixed term contacts and 208 callers were apprentices or trainees.

Casual employees, independent contractors, fixed term contract employees and apprentices/trainees are vulnerable workers as they lack certainty that they have ongoing employment. The fear of losing their job often results in them being hesitant to enforce their legal rights.

Table 2: Coverage of callers to JobWatch in the period of 1 July 2014 to 30 June 2016

Coverage	Count	Percentage of total calls
Caller does not know	3,676	24.28%
Modern Award	3,980	26.29%
Enterprise Agreement	1,838	12.14%

Table 2 illustrates that 1,838 callers (approximately 12% of callers) were covered by an enterprise agreement.

Employees who are covered by an enterprise agreement generally have the benefit of more generous conditions than those who are only covered by the minimum statutory protections [1] and more often than not, there is a strong trade union presence hence why there is an enterprise agreement in the first place.

3,980 callers (26.29% of callers) were covered by a modern award. The Modern Award is designed to work in conjunction with the NES to provide statutory minimum standards.[2]

3,676 callers (24.28% of callers) in that period did not know whether they were covered by an industrial instrument. This is concerning because they set out minimum terms and conditions of employment.

Table 3: Union membership of callers to JobWatch in the period of 1 July 2014 to 30 June 2016

Union Membership	Count	Percentage of total calls
Yes	760	5.02%
No	8,084	53.39%
Unknown	6,296	41.59%

Table 3 demonstrates that 760 JobWatch callers (5.02% of callers) identified as union members. Union membership became a mandatory field in the TIS database during September 2015. However, JobWatch believes that this figure is reasonably accurate as where a union is involved, it is usually raised in the context of the conversation with the TIS advisor.

Workers who are not members of a union are vulnerable to exploitation as they do not have the benefit of advice on minimum wages, minimum terms and conditions of employment, legal representation and collective bargaining.

[1] Section 193 of the *Fair Work Act 2009* (Cth) provides that the Fair Work Commission must be satisfied that employees covered by an enterprise agreement must be better off overall under the enterprise agreement than under the modern award

[2] Andrew Stewart, Stewart's Guide to Employment Law, Fifth Edition, 2015.

Terms of Reference

The incidence of, and trends in, corporate avoidance of the Fair Work Act 2009 with particular reference to:

(a) the use of labour hire and/or contracting arrangements that affect workers' pay and conditions;

(b) voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions;

(c) the use of agreement termination that affect workers' pay and conditions;

(d) the effectiveness of transfer of business provisions in protecting workers' pay and conditions;

(e) the avoidance of redundancy entitlements by labour hire companies;

(f) the effectiveness of any protections afforded to labour hire employees from unfair dismissal;

(g) the approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions;

(h) the extent to which companies avoid their obligations under the Fair Work Act 2009 by engaging workers on visas;

(i) whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations;

(j) legacy issues relating to Work Choices and Australian Workplace Agreements;

(k) the economic and fiscal impact of reducing wages and conditions across the economy; and

(l) any other related matters.

1. The Use of Labour Hire and/or Contracting Arrangements that Affect Workers' Pay and Conditions

In this section of our Submission, we focus largely on labour hire arrangements and potential increases in regulation in respect of labour hire. We also examine apprenticeship and traineeship schemes under labour hire arrangements along with rolling fixed term contract arrangements. This section will also briefly discuss electronic app driven labour arrangements along with the possibility that affected workers may have close to no legal protections in relation to their working arrangements. Finally, we examine internship or work experience arrangements with a discussion on the risks of the arrangements devolving into exploitative practice.

Whilst acknowledging that genuine labour hire arrangements are a legal and economically justifiable means by which businesses can engage workers, JobWatch submits that targeted regulation of this industry will have positive consequences for the recognition and protection of workers' rights.

The main purpose of labour hire workers is to allow organisations to access temporary injections of labour input in circumstances where they are not able to undertake the process of hiring workers at short notice. The arrangement was not intended as a long term labour solution which allows entities to circumvent traditional employment obligations. While it is important that the laws regulating labour hire arrangements must not undermine the flexibility of these arrangements, they must also ensure that important obligations of an employer also attach to the host organisation where they do not affect the flexibility of the arrangement. This is to deter host organisations from entering into labour hire arrangements in circumstances where such arrangements are not appropriate or genuine, entered into in order to exploit opportunities to avoid traditional employment obligations.

JobWatch believes this could be best achieved via a two-pronged approach being to specifically regulate labour hire companies and those individuals involved in running labour hire businesses and to disincentivise the use of labour hire workers by employers where traditional employment is more appropriate.

1.1 The Employment Status of Workers Engaged by Labour Hire Companies

In JobWatch's experience, labour hire workers are often engaged on a casual basis or under short fixed term contracts, have no security of employment and are regularly paid less than the relevant minimum wage rate.

1.1.1 Case Study: Jake – Casual Labour Hire Worker

Jake worked in a factory under a labour hire arrangement as a casual full time tradesperson.

The Maintenance Manager of the host organisation told Jake to speak with a senior manager about an occupational health and safety issue concerning a large piece of machinery. Jake started following this direction until a Middle Manager of the host organisation entered into an argument with him about engaging senior management.

His team leader said '*** *off and go home'*. Jake waited, and then said '*ok, I will go home'* and left. The labour hire company called Jake and said 'we no longer have employment for you' because he had abandoned his employment. Since then, he

has not had any work from the labour hire company.

1.1.2 Case Study: Edwina - Casual Labour Hire Worker on Fixed Term Contract

Edwina was a casual Inbound Sales Consultant employed by a labour hire company and working at a host organisation. She took a couple days of sick leave because she had bronchitis.

When she returned to work, she was still unwell. Therefore she asked them not to spray disinfectant near her. Soon after, her services were no longer required by the host organisation.

1.1.3 Case Study: Heather – Labour Hire Worker

Heather was employed by an energy company. She was seconded to an agency on a 3 month contract basis. The energy company paid the agency and the agency paid Heather.

Heather is unsure which company employs her and her eligibility for maternity leave if she became pregnant.

1.2 The Use of Labour Hire in Particular Industries and/or Regions

It has become increasingly apparent to JobWatch that labour hire workers make up a significant proportion of the labour market. Whilst our database doesn't specifically capture labour hire arrangements, a manual search for the term 'agency' produced 4,788 results. Although this gives us an indication of the large number of calls we have received in relation to labour hire arrangements since 1999, it is likely that there would be a far greater number that the search was unable to capture. Indeed, labour hire workers have become an alternative form of employment to permanent full time, part time or even casual employment [3]. Our anecdotal experience is that the trend towards the use of labour hire arrangements is ever increasing across most industries including the manufacturing, agriculture, retail and transport industries.

1.2.1 Case Study: Frances – Agriculture

Frances was employed as a strawberry picker by a labour hire company working at a farm with approximately 100 workers.

At times, she was either not paid on time or not at all. Her colleagues told her that they continued to work despite being owed thousands of dollars each.

Frances and some other labour hire workers had a 'walk off' due to non-payment of wages.

[3] Hall, R, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working Paper 76 April 2002, University of Sydney p 7

1.2.2 Case Study: Amy – Sales

Amy was a labour hire worker working in sales. She does not know if she is a union member.

Onsite at the host organisation, a customer made sexually suggestive comments to Amy over the telephone. The host organisation terminated her services because she hung up on the customer.

1.3 Modern Awards and Enterprise Agreements: Labour Hire

Labour hire workers in Victoria who are employees would also usually be covered by the relevant applicable modern award depending upon the industry in which they work. However, labour hire workers are not covered by any enterprise agreement made between a host organisation and its own employees unless the labour hire worker is a party to the enterprise agreement. Some labour hire agencies have their own enterprise agreements which will protect a labour hire worker if it covers the work they are undertaking. These enterprise agreements must contain better off overall conditions compared to the relevant modern award and the NES. However, due to the nature of the employment of labour hire workers, they are unlikely to be union members and therefore they do not usually have the benefit of collective bargaining and so are not usually covered by an enterprise agreement.

1.4 The Reluctance of Labour Hire Workers to Enforce their Rights

Although labour hire workers have various legal protections under workplace laws, industrial awards and equal opportunity legislation, in JobWatch's experience they are often reluctant to complain about employers who breach their legal obligations due to the precarious nature of their employment. This has a detrimental impact on the enforceability of such protections. The following case studies illustrate the reluctance of labour hire workers to speak out against their employers.

1.4.1 Case Study: Mandy – Sexual Harassment at Host Organisation

Mandy was sexually harassed by a worker who worked at her host organisation. She made a complaint to the host organisation.

After the host organisation fired the perpetrator, they did not give Mandy work for 2 weeks. They offered her a new job with less hours in a different department. She felt she was being victimised for complaining.

Mandy does not want to be moved or to lose her job. Her contract with the labour hire company says she must discuss complaints with the labour hire company not the host organisation.

1.4.2 Case Study: Nimasha – Harassment and "Termination" by Host Organisation

Nimasha was an Admissions Officer contracted out full time to a private college. The General Manager at the host organisation verbally harassed staff and students. At meetings he often told staff to *'shut the **** up'* and told Nimasha to tell a student to *'**** himself'* for requesting a consultation time. He regularly told staff members to *'get a nose job'.* He told her that if she ever broke up with her husband, she could be with him. When Nimasha spoke with other staff about the General Manager's behavior, they said that they knew about it but were too scared to speak up.

One day, the CEO of the host organisation told staff that they were moving offices and that all female employees must wear makeup in the new office. When Nimasha said she felt uncomfortable wearing makeup, the General Manager made her stand up in front of staff and told her that she had to wear makeup. She was then called in to the CEO's office (at the host organisation) and said that either he will *'fire'* her or she gives her resignation for disrespecting the General Manager. The CEO said that he liked being scary and having his staff *'*** themselves'*.

1.4.3 Case Study: Cathy – Return to Work Issues

Cathy broke her wrist at the client where she was placed and six weeks later it still hadn't improved. The labour hire company that she works for told her to put in WorkCover claim form. Cathy sent it off to her host employer who rejected it on the basis that they were not classed as her employer. The agency insisted that it is the client who is liable. Cathy pays her own tax, is paid by the client and then has to pay a percentage of this to the agency. She has spoken to WorkCover who have told her that given the client pays her she is not an employee of the agency and therefore may not be covered. Cathy has a letter to say that she is not deemed as an employee and so no claim is possible.

1.5 Apprentices and Trainees

The use of apprentices and trainees as labour hire workers is a growing problem. JobWatch regularly receives calls from apprentices or trainees who are working under labour hire arrangements. Not only are apprentices and trainees young and already at risk of exploitation due to their inherent vulnerability as a result of their employment status, adding the further ingredient of labour hire arrangements unjustifiably increases the risk of exploitation of these vulnerable workers.

By enforcing their legal rights, apprentices and trainees risk termination of their apprenticeship or traineeship and they may find it difficult to find another certified workplace to undertake their training**.** The successful completion of a traineeship or apprenticeship is a mandatory step in achieving professional licensing in many professions.

The following JobWatch case studies demonstrate the ways unscrupulous host organisations can exploit apprentices' vulnerable position.

1.5.1 Case Study: Fred – Apprentice Tradesperson

Fred was an Apprentice tradesperson employed by a labour hire company. He was placed in a small construction company to complete his apprenticeship.

His Site Manager threatened to kill him, verbally abused him and insisted that he

perform dangerous tasks such as killing bees without a bee suit.

Despite his poor treatment, Fred continued working there for 1 year and 8 months.

1.5.2 Case Study: Hamish – Apprentice – Electricity and Gas

Hamish was an Apprentice in the Electricity & Gas industry.

He was repeatedly called a 'faggot' at work and another colleague twice exposed his genitalia to Hamish and injured him by throwing objects at him.

Hamish was too scared to speak up about his treatment and was unsure of his obligations relating to his apprenticeship and if he could find another job.

1.5.3 Case Study: Vishal – Apprentice Motor Mechanic

Vishal was an apprentice Motor Mechanic working under a labour hire arrangement.

Vishal was assaulted at work. When he indicated to the host organisation that he was scared to work with the person who assaulted him, Vishal was returned to the labour hire company. The perpetrator was dismissed. Vishal has not got any work from the labour hire company since.

1.5.4 The following case further illustrates this serious problem

Insp Walker v Great Lakes Community Resources Inc t/as Workplace Services [2010] NSWIRComm 182

Mr Minett was an apprentice employed by a labour hire company. He was placed at a factory to complete his apprenticeship.

At the factory, Mr Minett was crushed by a forklift which caused him injuries, shock and distress. This accident occurred because he received insufficient safety training and the workplace was unsafe.

His Honour noted that the labour hire organisation relied on a few conversations and site visits to ensure occupational health and safety requirements were met. There was no consideration of safe working procedures of particular tasks.

As the case above demonstrates, labour hire organisations are not in a position to supervise the tasks undertaken by trainees in the workplace. Unlike regular labour hire placements, apprenticeships and traineeships are designed to be a *'…training contract between an employer and an employee in which the apprentice or trainee learns the skills needed for a particular occupation or trade*.'

Apprentices and trainees require greater supervision and protection than more experienced employees because they are yet to develop the practical skills from work experience in their chosen trade. JobWatch submits that the employer should be responsible for delivering the training of apprentices and trainees. Therefore, posting a trainee or apprentice to a host

company under a labour hire arrangement should be made unlawful and sufficient penalties should apply in order to provide an effective deterrent.

Recommendation 1: The employer should be responsible for delivering the training of apprentices and trainees. Therefore, posting a trainee or apprentice to a host company under a labour hire arrangement should be made unlawful under the FW Act and sufficient penalties should apply in order to provide an effective deterrent.

1.6 Workers on Rolling Fixed Term Contracts: JobWatch's Experience

Each year we receive a significant number of calls from individuals who are employed on what we will refer to here as "fixed term contracts" (even though we understand that mostly they are really "hybrid" or "outer limit" contracts, which contain terms allowing for termination during the life of the contract). Many of our callers have been on a series of back-to-back fixed term contracts for over two years. Not infrequently, they have been employed in this way (on contiguous fixed term arrangements) for much longer than that. The categories on our database for length of employment are:

- 3 months or less;
- 3 - 6 months;
- 6 - 12 months;
- 12 months - 2 years;
- 2 - 5 years;
- 6 – 10 years;
- 11 – 15 years;
- 16+ years.

We note that, for the purposes of the unfair dismissal laws, s.386 of the FW Act deals with the meaning of "*dismissed*". Section 386 states that:

> "(2) *…a person has not been dismissed if:*
>
> "the person was employed under a contract of employment for a specified period of time…"

Section 386(3) goes on to state that:

> "*Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part*."

Paragraph 1531 of the FW Act's Explanatory Memorandum states:

> "*Subclause 386(2) sets out circumstances in which a person is taken not to have been*

dismissed. These are where:

the person was employed for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, task or season" (underlining added).

Paragraph 1532 of the Explanatory Memorandum further states:

> *"Paragraph 386(2)(a) reflects the common law position that termination in these circumstances would not be a dismissal. The fact that an employment contract may allow for earlier termination would not alter the application of this provision as the employment has terminated at the end of the period, task or season. However, if a person engaged on this sort of contract is terminated prior to the end time specified in the contract, they may seek an unfair dismissal remedy if they satisfy the other requirements."*

As noted by Commissioner Deegan in *Drummond v Canberra Institute of Technology* [2010] FWA 3534, at [51]:

> *"[t]he intention of the legislature appears to be to retain the common law position that a contract which ends with the effluxion of time does not terminate at the initiative of the employer. The only change to the operation of the relevant provisions that is intended is to provide that an worker employed under a contract for a specified period of time, whose employment is terminated other than at the expiration of that contract, may make an application under the unfair dismissal provisions of the legislation."*

Accordingly, even where a worker might have been employed on a series of back to back short fixed term contracts for years on end, if the contract reaches its expiry date and is no longer renewed or extended, it seems the worker will not, be protected by unfair dismissal laws.

Moreover, if the worker believes that the fixed term contract arrangement is a sham, it appears that s/he will find it very difficult to establish, as per s.386(3) of the FW Act, that a substantial purpose of the contract was to avoid the employer's obligations.

Whilst in *D'Lima v Princess Margaret Hospital* (1994) 64 IR 19, Marshall J recognised that a worker who had been on a series of short fixed term contracts had a legitimate expectation of ongoing employment and did in reality have a continuous employment relationship with her employer, it appears that no other workers have succeeded in establishing that they were on fixed term contracts merely for avoidance purposes. For example, in *Drummond v Canberra Institute of Technology* (cited above), the worker relied heavily on *D'Lima,* but Commissioner Deegan dismissed the possibility of a sham and distinguished the facts of that case from the facts before her:

> At [53] "…*for the entire period of the applicant's employment with the respondent from 2003 to 2009 there was always a written employment contract which governed that employment. In D'Lima the applicant had been employed by the respondent for periods when no written contract governed her employment. Clearly the applicant in the D'Lima case may have had a legitimate expectation of ongoing employment at the cessation of each contract. The applicant in the matter before me was well aware*

that his employment could end with the expiration of each contract. A number of statements made by the applicant during submissions by the applicant clearly indicated that he was aware his employment could end at the expiry of his contracts. Clearly in this case there is an absence of "strong countervailing factors" [indicating a continuous employment relationship]."

At JobWatch, we consider that the FW Act should be amended so that workers who are on fixed term contracts for longer than 24 months are automatically converted to permanent employment unless the employer refuses the conversion on reasonable grounds. Factors to be taken into account in deciding whether there are reasonable grounds for refusing the conversion would need to be outlined in the FW Act. This would need to be a civil penalty provision in order for it to have any real weight.

Such a provision would not only extend protections of the unfair dismissal laws to many long-serving workers who are currently excluded. It would also allow these workers to enjoy the minimum entitlements set out in the NES such as notice of termination and redundancy entitlements. Such a provision would, in our view, minimise the disadvantage and insecurity that is associated with contiguous fixed term arrangements and accordingly, it would be one way of achieving greater social inclusion.

Recommendation 2: The FW Act should be amended to ensure that workers on fixed term contracts for longer than 24 months are converted automatically to permanent employment unless the employer refuses the conversion on reasonable grounds.

Case studies from JobWatch's database highlight the limitations faced by workers on a series of fixed term contracts (or on continuous renewals of a fixed term contract).

1.6.1 Case Study: Imogen – Project Officer – Fixed Term Contracts

Imogen worked as a Project Officer at a bio-tech research institute. She worked for 8 years on a series of fixed term contracts which were renewed yearly.

Imogen took a period of maternity leave. She was then told that her employment contract would not be extended because of 'funding cuts'.

1.6.2 Case Study: Barry – Doctor – Fixed Term Contracts

Barry was employed by a health insurance company as a Doctor. He worked for 4 years on identical 1 year fixed term contracts.

He was informed that in the most recent budget, Management withdrew funding for his position. Barry was unsure whether he would be eligible for redundancy pay.

1.7 Internship Arrangements

Internships are a ubiquitous part of the current Australian education experience. Particularly in certain competitive industries such as law, advertising and finance, where competition for work is fierce, internships are a rite of passage for many students as a means of improving their potential employability.

Our service over the last 10 years, has seen a surge in calls, predominantly from students (locally and internationally) and migrant workers regarding internship arrangements. The majority of these callers are primarily concerned about the conditions of their internships, whether the work they perform should be paid for and whether or not they are entitled to a full time job upon completion of their internship.

Below are case studies which are typical of calls our service receives in regards to internships.

1.7.1 Case Study: Jerry - Internship With Onerous Unpaid Productive Work

Jerry started a 3 month internship in a communications company. He signed a contract which stated that during the duration of this internship, he would not be paid.

Throughout the course of the internship, Jerry designed several complex databases which involved a significant degree of hard work and effort. Jerry believes that he should have been paid something because of this effort.

Jerry has contacted the employer about this, but his employers have responded by saying he would not be paid.

1.7.2 Case Study: Scott – Internship With Onerous Unpaid Productive Work

Scott is a university student. Over the summer break, he did an internship with a finance company. Before he took up the internship, he was informed that the internship was one which was to be purely observational. However, upon commencement and completion of the internship, he had that he had completed 200 hours of work, work which the other advisors at the financial company did not want to undertake.

1.7.3 Case Study: Hiromi- Productive Work Below Minimum Wage Disguised as an Internship

Hiromi found work with a company which offered her work based on an 'internship arrangement'. The work that she would be performing for this company had nothing to do with the current tertiary degree she was studying.

The agreement which this company signed described her position as an ' intern'. The terms required her to agree that the internship was well within the ambit of her tertiary degree, and would be 'considered in her studies', even though this was clearly not the case. Under the agreement, she was paid well below the minimum wage.

The work which Hiromi undertook was work she regarded as far more than merely educational and was more akin to productive work.

Hiromi is confused as to the legality of this internship arrangement. Hiromi feels that she should be paid at least the minimum wage for the hours she worked.

It is clear from the above case studies that 'internship' arrangements can and are used in an exploitive manner. In many of the calls which we receive in regards to internships, many interns find themselves performing productive work, work which employees perform, for no pay or for pay far below the minimum wage. Many callers also explain how they were lured into internship arrangements with onerous workloads with the possibility of being offered permanent paid work. In many of the calls we receive, it is common for interns to fail to receive any offers for permanent work upon completion of their internship. It is not uncommon for callers to find themselves learning almost nothing about the particular industry they are seeking to enter after their internship, citing a lack of engagement from the employer or being overburdened with unpopular menial tasks.

1.7.4 Payment for Internships or Work Experience

Most disturbingly, our service has received a number of calls regarding 'paid work experience' schemes. The case studies below, illustrate these schemes.

1.7.4.1 Case Study: Vito- Exploitative Payment for Internship Placement

Vito signed up with a recruitment organization to assist him to find an internship. Vito did not read the application form properly prior to signing this application.

Upon signing the form, he paid $500 dollars up front as an 'application fee'. Unbeknownst to Vito, in the terms of the application form, he was required to pay an additional $2500 prior to the first interview.

Vito is concerned about this arrangement. He believes it is largely unfair. He wants to end the arrangement but is concerned that the company will come after him for the $2500 amount within the terms of the application form.

1.7.4.2 Case Study: Bethany- Exploitative Payment for Internship Placement

Bethany signed up with a recruitment organization to assist her in finding an internship. The recruitment organization found her a 16 week internship.

Under the terms of the agreement with the recruitment organization, Bethany was required to pay her own insurance of $1700 along with an initial application fee of $300. Upon the recruitment organization finding her an internship, she is required to pay the organization a 'finders fee' of $2000.

Bethany is suspicious of her arrangement with the recruitment organization. She feels that this arrangement is not legal.

These schemes involve three parties, namely the internship seeker, the recruitment organisation and the workplace. These schemes operate with recruitment organizations advertising 'work experience' placements to internship seekers. These recruitment organisations often openly advertise the benefits of having work experience, citing examples of past clients being offered full time work upon completion of an internship. Upon finding a suitable placement for their internship seeker, the recruitment organization charges the internship seeker an exorbitant amount of fees. Signing fees, fees charged for secured interviews as well as fees upon successful internship placement are just some examples of these unfair fees which can range up to a few thousand dollars.

The victims of such schemes are largely foreign students who are desperate for any chance at permanent work to secure residency within Australia. These schemes are not limited to foreign students with local students affected as well.

1.7.5 Internships: How Do We Prevent Exploitative Practices?

With the increase in university graduates across the Australian employment land scape,[4] it appears that internship or work experience arrangements are here to stay for the foreseeable future. Even the federal government seems convinced of the public good which internships provide for youth, with an announcement of the PATH Internship Placement scheme in the 2016 Budget.[5] Under this scheme, youth jobseekers will be placed in business as interns for 15-25 hours per week, these jobseekers will receive an additional $200 on top of their current welfare payments, with the host businesses receiving an upfront payment of $1000.[6]

JobWatch understands the value which internships and work experience can bring to students or those seeking to enter an industry. However, our service is particularly concerned about the inability of the current regulations to effectively prevent exploitation of those within internship schemes. In regulating internship arrangements JobWatch understands that it is necessary to balance two competing policy objectives, namely, ensuring that companies do not use internship arrangements as employee obligation

[4] Stephanie Ryan Smith, 'University Graduates Gluts are leaving us overqualified, in debt and out of work', *Sydney Morning Herald* (Online), 11 August 2015 http://www.smh.com.au/comment/university-graduates-gluts-are-leaving-us-overqualified-in-debt-and-out-of-work-20150810-giviq0.html

[5] Commonwealth of Australia, *Jobs and Growth: Creating a new path to youth* employment (11 May 2016) Budget 2016-17 <(http://budget.gov.au/2016-17/content/glossies/jobs-growth/html/jobs-growth-07.htm>

[6] Ibid.

avoidance and ensuring that students and work seekers have access to workplace specific knowledge and experience.

Under the FW Act, workers who are working as part of a vocational placement will not be regarded as 'national system employees' as defined by the FW Act, thus denying any entitlements afforded by that categorization.[7] There are significant issues with this 'vocational placement' exception[8] within the FW Act. As expressed by Professor Ian Stewart in the report to the Fair Work Ombudsman, "*Experience or Exploitation"*[9] there is a real lack of guidance both within the FW Act, and in case law as to the 3 separate limbs of the "vocational placement" exception contained within s 12 of the FW Act.

The fundamental problem surrounding unpaid internship agreements is the lack of clarity surrounding their status under the FW Act. As observed in Hiromi's case study above, the abuse of the poorly defined 'vocational placement' exception as a means of avoiding employer obligations per the FW Act is already a present reality. We refer to the report "*Experience or Exploitation*"[10] for an excellent, deeper discussion of the problems with the vocational placement exception contained with s 12 of the FW Act.

JobWatch recognises clear steps which regulators and legislators can take to prevent further exploitation under internship arrangements.

Firstly, the FWO needs to establish their view as to the legality of unpaid internships and other similar arrangements. This recommendation echoes the suggestion within the report "*Experience or Exploitation"*[11], with the report making it clear that the body has to make a policy stance as to the legality and legitimacy of current unpaid internship arrangements. Due to the large degree of uncertainty around the limbs of the 'vocational placement' exception within s 12 of the FW Act and a lack of clear guidance from framers behind the provision, it is of critical importance that the FWO establish a clear view on the application of this exception.

The report '*Experience or Exploitation'*[12] recommends a regulatory approach where any person performing productive work for an organisation under an arrangement where they will gain experience or be considered for a permanent job will be regarded as being under an employment contract, unless there is evidence to the contrary.[13] JobWatch stands behind this regulatory approach and believes that this is a step forward from the current confusion around internship arrangements.

Recommendation 3: The FWO has to issue, at minimum, a policy statement, regarding the application of the 'vocational placement' exception contained within section 12 of the FW Act to bring further clarity on the legality of many vocational placement type arrangements.

[7] *Fair Work Act* 2009 (Cth) s 12.
[8] Ibid.
[9] Andrew Stewart and Rosemary Owens, '*Experience or Exploitation'*, (Report, Fair Work Ombudsman, 2013).
[10] Ibid 75.
[11] Ibid 248.
[12] Ibid.
[13] Ibid 249.

Secondly, JobWatch recommends further engagement of the FWO with tertiary education providers, the Australian Competition and Consumer Commission, and the Department of Immigration and Citizenship to target the issue of unpaid internship agreements. Education campaigns will assist students, migrant workers, and consumers alike in understanding their rights under unpaid internship agreements, as well as ensuring they able to recognise exploitative practise when it occurs.

Recommendation 4: The FWO has to engage with tertiary education providers, and other relevant government bodies to ensure that students, migrant workers and consumers understand their rights under unpaid internship agreements and are aware of exploitative practice under said arrangements.

1.8 Electronic "App" Driven Labour Arrangements

The rise of 'app driven' labour arrangements over the last 5 years has seen tremendous growth in Victoria. 'App driven' labour arrangements are essentially labour arrangements between application providers, workers and consumers. These arrangements typically involve the connection of workers with consumers requiring services through an internet based electronic application, for which the app provider charges the worker a fee or a commission.

The increasing number of workers who are turning to app driven labour arrangements has resulted in an increasing number of calls being made to our service. Callers to our service call mainly about being involuntarily 'disconnected' from use of the application by the application provider, or loss or damage of property or personal injury whilst undertaking work allocated by the application provider.

The rise of these 'digital disruptors' provides many exciting opportunities for consumers, workers and capital alike. However, JobWatch is concerned about the ability of existing legislative protections to adequately secure worker's rights in a rapidly changing labour environment. The increasing decline of full time employment in the Australian workforce[14] and an increase in the popularity of app driven labour arrangements raises some serious concerns about the future of working rights in a 'new' economy.

The below case studies are some examples of the concerns and grievances which callers have in regards to app driven labour arrangements.

1.8.1 Case Study: Catherine - Disconnection from Uber App

Catherine was an Uber driver. Prior to her use of the Uber application to find work, she agreed to an electronic contract with Uber.

One day, she found herself disconnected from use of the Uber application. Catherine later found out that Uber had decided to disconnect her from the service because she had failed to meet Uber's standards in regards to maintaining a particular feedback rating.

Catherine is confused, and is wondering what recourse she has.

1.8.2 Case Study: Hosea- Disconnection from Uber App

Hosea received an email from Uber, stating that his driver rating had fallen below 4.5 and because of this his Uber account would be terminated, thus disconnecting him from use of the Uber application.

Hosea had also been told not to contact Uber again in regards to being a driver. Any attempts that Hosea has made to contact Uber about this disconnection has been met with the same standardized email which states that Uber will stand by its decision.

1.8.3 Case Study: Lim- Damage Incurred to Property While Undertaking Work for Deliveroo

Lim was a bike courier for Deliveroo. Lim and his fellow bike couriers communicated with Deliveroo primarily through a group messenger app known as 'Telegraph'. Through this app, Lim and his fellow bike couriers would receive offers for work from Deliveroo.

Lim states that Deliveroo provides work to bike couriers on the basis that they are independent contractors. Lim states that many of his fellow bike couriers are backpackers who are unaware of their legal entitlements. Deliveroo advises its bike couriers to take out contractors' insurance, but does not ensure that its couriers actually do so.

Lim knows of several fellow delivery couriers who were hit by cars in the carrying out of their duties, with Deliveroo failing to pay for their medical expenses.

Lim was hit by a tram while on a delivery job. As a result he suffered damage to his bike. He filed a request for compensation to Deliveroo for repair of his bike. Deliveroo did not respond to this request.

Lim came across a newspaper article which described the independent contractor arrangements between Deliveroo and its drivers as a 'sham'. Lim posted a link to this article on the 'Telegraph app' communicating to other couriers that they were actually employees entitled to an award.

As a result of this, Lim states that he was removed from the Telegraph app, thus effectively preventing from receiving any more work from Deliveroo.

1.8.4 App Driven Labour Arrangements: Employees or Private Contractors? Technology Company or Employer?

Perhaps the most significant issue which app driven labour arrangements raise is the classification of workers as employees or independent contractors under such arrangements. Alongside this is also the issue of whether electronic application companies are whole sale employers or merely 'facilitators' of business between independent bargaining entities and consumers. These tenuous distinctions have seen much media spotlight with a recent decision by the Employment Tribunal in the UK which recently classed

'Uber' drivers as employees and not independent contractors.[15] The judge in this case decided that the various factors of the relationship between Uber and their drivers point definitively towards an employment relationship.[16] There is a lack of jurisprudence in Australia on this issue.

Underlying many of these app driven labour arrangements, is the classification of workers under these arrangements as independent contractors, which allows an avoidance of the costs and regulatory burdens related to the maintenance of employees.

Despite this classification of workers as private contractors and not as employees, the contracts between platform providers and workers often blur this distinction. In applying the common law control test[17] to many app driven working arrangements, the distinction between either private contractor or employee is one which is largely blurred. In the case of ridesharing company, Uber, the amount of control exercised in its supposedly private contractor arrangements is palpable. Drivers for the driving company are expected to maintain a particular "stars" rating to ensure continued work with Uber. Drivers are also expected to meet a required "acceptance" rate or face temporary or permanent 'disconnection' from the Uber app. Furthermore, the cleanliness of the vehicle, the condition of the vehicle and the behaviour of the driver are all factors which Uber monitors and expects its drivers to ensure.

The judgement decision by the UK Employment Tribunal which found Uber to be an employer, examined a number of key factors in the relationship between Uber and its drivers. Some of these factors include, the inability for drivers to accept or decline bookings, the direct interviewing and recruitment of drivers, the setting of routes by Uber which the driver is 'encouraged' to follow, a ratings system akin to an employer's performance management system and the fact that Uber reserves the power to amend the drivers' terms unilaterally.[18]

Most pertinently, the tribunal states that the notion that Uber (in London) "is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous"[19]. The tribunal makes it clear that Uber's assertion that drivers are independent contractors who are separate bargaining entities is a fiction. The tribunal states that Uber's contract with its drivers (Partner terms) requires that the driver must agree that a contract for driving services exists only between the driver and the passenger.[20] The tribunal points out that the driver has to agree to terms with passengers set out to them by Uber, follow a route prescribed by Uber (or depart at their own risk), charge a fee set by Uber, and ultimately receive payment from Uber". [21]

In the Australian context, there has yet to be any judicial decision as to whether workers under app driven labour arrangements are to be classified as employees or independent contractors.

[15] *Aslam, Farrar and Ors v Uber and Others* [2016] UKET 2202550/2015
[16] Ibid 26.
[17] *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (No 3) [2011] FCA 366 [28]
[18] *Aslam, Farrar and Ors v Uber and Others* [2016] UKET 2202550/2015, 29.
[19] Ibid 28.
[20] Ibid.
[21] Ibid.

1.8.5 JobWatch's experience

There are a number of common complaints we receive in regards to "app driven" labour arrangements.

A complaint common of many of the above case studies, is the termination of the working arrangement without regard to any form of procedural fairness. Attempts made by complainants to gain an explanation as to the reasons for the termination of their working agreement are usually met with no or a minimal response.

Some callers describe a clear lack of oversight or responsibility of application providers to clearly outline the insurance obligations of workers under their labour arrangements. Workers often find themselves shocked and surprised to discover that damage to property or personal injury during work provided by the application provider, will not be covered by the respective application provider or its insurer. Furthermore, there are complaints that workers under these app driven labour arrangements earn much less than employees protected by minimum wage entitlements.[22]

The main concern that JobWatch has with app driven labour arrangements is the ability for application providers to disclaim any obligations traditionally involved in an employment relationship. App driven labour arrangements, such as the one discussed above, are increasingly blurring the line between employee and independent contractor, transport service provider and technology company. With the decline of full time employment overall in the Australian employment market, the possibility that more Australians will resort to app driven labour arrangements is a realistic one.

Given the upward trend in workers taking up these relatively new forms of working arrangements, it is key that legislators and industry bodies keep a close eye on these developments. It is of fundamental importance that regulators, legislators and the public at large see beyond the myopic allure of a future of democratised work where a 'mosaic' of empowered independent businesses exist in place of traditional employment. Despite the promises in increased value for consumers and the marketplace as whole, there is a very real risk of app driven labour arrangements exploiting those with the least amount of bargaining power.

JobWatch believes that there are steps which can be taken to ensure greater rights for those outside traditional employment working arrangements. Firstly, legislators should provide a statutory definition of 'independent contractor' in the FW Act.

Recommendation 5: The FW Act should be amended to provide a statutory definition of independent contractor.

Secondly, there needs to be an effective minimum entitlements scheme in place for all independent contracting arrangements, particularly in regards to the minimum wage or fee. JobWatch understands that in practise, legislating and enforcing such a scheme would be difficult to achieve due to avoidance issues etc. However, JobWatch believes that a

[22] Maya Kosoff, 'UBER DRIVERS SPEAK: We are making a lot less money than Uber is telling people", *Business Insider* (Online), 29 October 2014 <http://www.businessinsider.com.au/uber-drivers-say-theyre-making-less-than-minimum-wage-2014-10>.

minimum entitlements scheme would prevent independent contractors, particularly those with limited bargaining power, from being exploited under independent contracting agreements in the first place. Minimum terms and conditions would also ensure that exploited workers could have recourse to at least some form of minimum entitlements without having to undergo the burdensome task of navigating the legal distinction between employee and independent contractor.

The *Independent Contractors Act 2006* (Cth) already provides protections for independent contractors in certain circumstances as it sets out a national unfair contracts scheme where genuine independent contractors can ask a court to set aside a contract if it is harsh or unfair. There is no reason why the *Independent Contractors Act 2006* could not be amended to provide, among other things, a minimum hourly contractors' fee similar to the national minimum wage.

Recommendation 6: An effective minimum entitlements scheme for all independent contracting arrangements should be implemented. This could be achieved by amending the *Independent Contractors Act 2006* (Cth) to provide an effective minimum entitlements scheme for all independent contracting arrangements including, for example, a minimum hourly contractors' fee.

Thirdly, there has to be closer supervision of app driven labour arrangements by regulators and legislators. It is crucial that a close eye is kept on the specifics of how these labour arrangements are carried out, particularly on details such as workers' pay and conditions, and the specificities of the arrangement between app provider, worker and consumers.

Recommendation 7: There has to be better monitoring of app driven labour arrangements by regulators and legislators.

2. The Effectiveness of Transfer of Business Provisions in Protecting Workers' Pay and Conditions

2.1 Existing Provisions in the FW Act

At common law, transfer of business between associated and non-associated entities terminates the contract of employment. This derives from the first employer's inability to unilaterally change the employee's contract by assigning it to the second employer.[23] The FW Act introduces a statutory presumption of continuity of service between non-associated entities (s 22(5)(a)). However, the second employer can decide not to recognise the first period of service for the purposes of transferring accrued and untaken annual leave (s 91(1)), or for calculation of redundancy entitlements (s 122(1)) and in relation to the minimum employment period required to be eligible for unfair dismissal protection (s 384(b)).

[23] *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014; [1940] 3 All ER 549.

These provisions are generally clearly phrased and provide an adequate framework balancing the rights of all relevant parties.

Nevertheless, JobWatch recommends that amendments be made to existing provisions regarding transfer of employment in the FW Act to ameliorate problems as set out in the below case studies.

Recommendation 8: Existing provisions around transfer of employment in the FW Act be preserved.

2.1.1 Case study: Sabrina – leave entitlements

Sabrina worked for a small business which was recently sold. At the time of the sale, Sabrina was told everything would continue as normal. However, her next payslips showed her leave entitlements were at zero. Sabrina's new boss said a condition of sale was that all the employees' leave entitlements would be reset. Sabrina's old boss told her that it was the new owner's responsibility

In the case study of Sabrina, the sale had already concluded by the time the dispute was clear. Furthermore, in many cases a transfer of business will precede the first employer going into administration or liquidation. An employee in Sabrina's situation cannot access the Fair Entitlement Guarantee (FEG) safety net. However, the new business owner may be unwilling to pay, as they may have expected that the first employer paid out the transferred employee's entitlements.

JobWatch recommends that the allocation of risk be clarified. The introduction of a statutory presumption of transference will mean that either the vendor employer will include payment of leave entitlements in the purchase price, or the purchaser employer will be aware of the entitlements they are bound to honour.

Recommendation 9: The FW Act should be amended to include a statutory presumption that accrued leave entitlements will be transferred to the new employer on transfer of business.

2.2 Term of Continuous Service

An employee's term of continuous service is significant as an eligibility factor for various protections and entitlements under the FW Act, most significantly unfair dismissal (s 383) and redundancy payments (s 119(2)).

Note: *Long Service Leave is usually governed by State regulation, and thus is beyond the scope of this submission.*

It is established in case law that an employee's term of continuous service should be preserved in a transfer of business unless explicitly and unambiguously excluded.[24] However, a new employer may be unaware of or unwilling to honour this term.

2.2.1 Case study – Karin – prior service

Karin worked for her first employer for three years, until the business was taken over. During the takeover process, Karin was paid out her accrued and untaken annual leave, but was orally assured that her record of service would carry over. After three months with the new employer, Karin made a bullying complaint. She was dismissed shortly afterwards and told that it was the end of her probationary period.

Due to the fact that on transfer of business, the new employer can choose not to recognise an employee's period of service with the old employer for the purpose of the minimum employment period for unfair dismissal protection, JobWatch recommends that section 22(5) of the FW Act be amended to clarify that a term of service is continuous for the purposes of unfair dismissal unless clearly and unambiguously excluded.

Additionally, JobWatch recommends that the FW Act be further amended to include a requirement that any proposed exclusion of continuous service for the purposes of unfair dismissal be outlined in a document separate to any written contract with the new employer.

Recommendation 10: Section 22(5) of the FW Act should be amended to clarify that a term of service is continuous for the purposes of unfair dismissal unless clearly and unambiguously excluded.

Recommendation 11: The FW Act should be amended to include a requirement that any proposed exclusion of continuous service for the purposes of unfair dismissal to be outlined in a document separate to any written contract with the new employer on transfer of business.

2.2.2 Case study: Carter – notice entitlement

Carter has worked at a franchise restaurant for seven years. The restaurant is about to be sold, but Carter and his colleagues have received mixed messages. The current owner has told them that the new owner will definitely keep them on, but the new owner has made it clear she wants to bring in her own staff. Carter is entitled to 5 weeks notice. However, the settlement is next week, and the current owner is still adamant his entitlements will be carried over. Carter is concerned the current owner

[24] *Chee v Chubb Security Australia Pty Ltd* (2001) 49 AILR ¶9-189; *Erduran v The Menzies Group of Companies t/a Allcorp Pty Ltd* (2003) 53 AILR ¶200-001; cf *Lutze v Ozbake Pty Ltd* (2003) 53 AILR ¶100-048(71).

is trying to get out of paying notice entitlements.

JobWatch therefore recommends that there be a requirement of a written statement provided by employers confirming the status of an employee's continuity of service and what entitlements they have and have not carried over, similar to the Fair Work Information Statement.

Recommendation 12: The FW Act should be amended to include a requirement of a written statement by employers as to the status of an employee's continuity of services on transfer of business.

2.3 Industrial Coverage

A highly litigated facet of transfer of business is whether employees will be covered by the instrument their first employer used, and that which the new employer uses. This is most often the subject of litigation where the first employer's instrument is preferable to the new employer's instrument, and may overlap with issues of sham contracting and forced casualisation. While the transfer of enterprise agreements is dealt with in the FW Act, (s 312), it can be problematic where the new employer wants to use a different modern award, modern award classification or requires a new contract be signed with different terms and conditions.

2.3.1 Case study: June – new contract

June has worked for the same employer for almost ten years. The employer's business was recently sold, and June's new employer is pressuring her to sign a new contract. Under the new contract, June has been demoted down the relevant award level, and her previous service will not be recognized. June was told by her new employer that she had to either sign the new contract or go on a performance management plan.

2.3.2 Case study: Tessa – new contract

Tessa worked as a permanent employee for a business which was recently sold. Tessa's first employer stated in a letter that her employment conditions would not change. However, the new employer made all transferring employees sign a contract including a probationary period. The new employer pressured Tessa and other workers to become casuals. Tessa stated she did not want to. The next day, Tessa's probation was cancelled for a minor infraction. Tessa was offered her job back on the condition that she agree to work casually.

2.4 Transfer of Assets

A component of whether a sale constitutes a transfer of business is whether there is a transfer of the first employer's assets to the new employer.[25] If there is no connection with the previous employer in accordance with an "arrangement" between the old and new employer, then there is no transfer of assets, and thus no transfer of employment.[26]

This area of case law has produced unclear and complex results. JobWatch therefore recommends that section 311(3) of the FW Act be amended to further clarify when a transfer of assets has or has not occurred. This could be achieved by providing a definition of what is meant by an "arrangement".

Recommendation 13: The FW Act should be amended to further clarify when a transfer of assets has or has not occurred under the transfer of business provisions by providing a definition of the meaning of "arrangement".

2.4.1 Scenarios in Which Disputes Around Transfer of Business May Arise

JobWatch submits that if further information was available to employers and employees it would assist in ameliorating transfer of business-related issues.

Recommendation 14: The FW Act should be amended to mandate that a Fair Work Transfer of Business info sheet is to be provided to employees by the vendor employer.

2.4.2 Accrued Leave Entitlements

This most commonly takes the form of the first employer claiming entitlements are transferred over, and the new employer claiming entitlements should have been paid out. In these situations, both employers disclaim responsibility, and the employee is left wondering who they should be proceeding against. This problem would also be ameliorated by the provision of a Fair Work Transfer of Business info sheet (Recommendation 2.4.4) which would be provided by the vendor employer to its employees prior to the transfer of business detailing what entitlements would transfer to the new employer.

3. The Avoidance of Redundancy Entitlements by Labour Hire Companies

JobWatch notes that some labour hire companies avoid paying redundancy entitlements to their permanent workers, for example claiming that the worker is still on their books and therefore they have not been dismissed. However in JobWatch's experience, the reality is

[25] See *Fair Work Act 2009* (Cth), s 311(3); *Zabrdac v Transclean Facilities Pty Ltd* [2011] FWA 4492, [64], [74].
[26] *Hillie v World Square Pub* [2012] FWA 6806.

that most labour hire workers are casual workers therefore they do not have an entitlement to redundancy payment. A different question is whether the host employer is avoiding redundancy payments etc by using labour hire workers in what would otherwise be traditional employment situations.

4. The Effectiveness of any Protections Afforded to Labour Hire Employees from Unfair Dismissal.

JobWatch believes that labour hire workers are not afforded adequate protections from unfair dismissal as they are not expressly protected by the unfair dismissal laws.

The above questions ((e) and (f)) will be dealt with together in this Submission below.

4.1 JobWatch's Experience and Recommendations

JobWatch receives many calls from workers who are either employed, or sometimes engaged as independent contractors, by labour hire agencies which then place them with host organisations for what often turns out to be a lengthy period of time.

In many instances, the only contact the workers have with the labour hire company is that the labour hire company issues pay slips, pays wages by electronic transfer, pays superannuation entitlements (if any) and furnishes the worker with a PAYG certificate at the end of the financial year.

That is, the agencies, who on the face of it are the employers, are often in reality no more than paymasters. On the other hand, the relationship that the workers have with the host organisations is more akin to that of worker/employer, in that the workers:

- Often undertake induction and training as to the host organisation's policies and procedures;
- Work exclusively for the host organisation;
- Have their work allocated and controlled by the host organisation, not the labour hire company;
- Report to management staff of the host organisation;
- Wear a uniform of the host organisation and use materials and facilities of the host organisation;
- Do not work during any period when the host organisation may shut down (eg over Christmas);
- Record their hours using the host organisation's time recording system; and
- Make applications for leave or absences from work directly to the host organisation without regard to the labour hire company.

When the host organisation suddenly decides it no longer wants to retain the worker, it simply notifies the labour hire company to stop sending the worker. This includes situations

where the reason for no longer needing the worker is that position is no longer required to be done, i.e when the worker's position has been made redundant. The host organisation is not legally required to make a redundancy payment to the worker if it is unable to offer suitable redeployment because it is not the worker's employer. Additionally, the circumstances may be unfair but the worker is lead to believe that if s/he lodges an unfair dismissal claim against the host organisation, that company will respond by objecting to the FWC's jurisdiction on the basis that it is not the employer.

Alternatively, if the worker lodges an unfair dismissal claim (or claims redundancy pay) against the labour hire company, it is likely to object on the basis that - if the worker is a worker of the labour hire company - it has not dismissed the worker as the worker is still on their books, or – if the worker is an independent contractor engaged by the labour hire company – it is not the worker's employer. . Workers in these situations are particularly vulnerable and are, in our view, in need of stronger labour law protections.

The notion of joint employment, which is recognised in the United States, has not yet been established in an Australian court and remains contentious. In *Morgan v. Kittochside Nominees Pty Ltd* (PR918793, Munro J., Coleman DP, Gay C, 13 June 2002), a Full Bench of the AIRC expressed a view (obiter dicta) at [75] that: "no substantial barrier should exist to accepting that a joint employment relationship might be found and given effect for certain purposes under the Act." In the previous paragraph ([74]), the Full Bench had noted that the "doctrine of joint employment, or of joint employers, is well-established in labour law in the United States." The Full Bench then cited a passage in which the standard of joint employment was put in the following way:

> *[W]here two or more employers exert significant control over the same workers - where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment - they constitute `joint employers' within the meaning of the NLRA. [NLBR v. Browning-Ferris Indus., 691 F. 2d 1117 (wd Cir. 1982); see also, TIJ, Inc., 271 NLRB 798 (1984).*

More recently, in 2009, in *Orlikowski v IPA Personnel P/L* [2009] AIRC 565, at [42] and [43], Lacy SDP said the following of joint employment in Australia:

> *[42] It is necessary to consider IPA and AQIS' contentions that joint employment is unknown to Australian law. The facts in this case suggest the arrangement between IPA and AQIS may have been one of "payrolling". IPA's only contact with Mr. Orlikowski was through recruitment and payslips. The concept of joint employment is generally accepted in the United States of America. While labour hire services facilitate flexibility the process has the potential to undermine collective bargaining, occupational health and safety, vicarious liability, accountability, job security and workplace harmony. There is an increasing incidence in the use of labour hire providers in Australia and it presents significant issues in termination of employment matters. First and foremost the issue normally involves discernment of which of the putative or potential employers is the actual employer. The fundamental question is whether two, otherwise unrelated, legal entities share or co-determine those matters governing essential terms and conditions of employment which depend on the control one employer exercises, or potentially exercises, over the labour relations policy of another. If not, it is necessary to determine who the employer is and who is responsible for the termination of employment.*

> *[43] In 2002 a Full Bench of the Commission noted that there had been no definitive ruling by a court on the doctrine of joint employment in Australia. This remains the case, although the doctrine has gained some acceptance in the Australian Industrial Relations Commission, and in the Western Australian and New South Wales Industrial Relations Commissions. Whether or not there is acceptance of the doctrine of joint employment in Australia provides no immediate relief however for either of the parties potentially liable in this case, in light of the conclusions I have reached.*

At JobWatch, we are of the view that labour hire arrangements should not be permitted to undermine the protections otherwise afforded to workers under the FW Act. It should not be possible for the labour hire company to avoid any responsibility under the FW Act by disowning the actions of the host organisation. Equally, it should not be possible for the host, who has controlled the relationship with the worker and has taken the benefit of the worker's labour, to hide behind a labour hire arrangement and thereby evade its responsibilities under the FW Act.

There should, therefore, be express recognition in the FW Act of the fact that, for the purposes of unfair dismissal, two separate entities may be deemed to be joint employers in circumstances where they share or co-determine matters governing employment. This should extend to situations where labour hire workers are engaged as independent contractors on sham arrangements (where they really ought to be workers) and are placed with host organisations that control their work.

Recommendation 15: The FW Act should be amended to give express recognition of the fact that, for unfair dismissal purposes , two separate entities in a labor hire scenario may be deemed to be joint employers in circumstances where they share or co determine matters governing employment.

This should extend to situations where labour hire workers are engaged as independent contractors on sham arrangements and are placed with host organizations that control their work.

As described above, however, it is often the case that the labour hire company merely plays the role of paymaster, not exercising any real control over their workers who are placed with host organisations. Hence, in these circumstances, the host should, for the purpose of unfair dismissal matters, be recognised as the true employer, regardless of whether the worker is employed by the labour hire company or is engaged as an independent contractor with the labour hire company on a sham arrangement.

It is not enough that FWC already has the power to look at the "inherent character" and "real substance of" the relationship as objectively determined (*Damevski v. Giudice* (2003) 202 ALR 494 (Merkel J), [144] and [172]) and that it will not be constrained by labels which the parties apply to the relationship. Most workers will not be familiar with the jurisprudence on this point and will assume that they cannot apply for an unfair dismissal remedy against a host organisation.

Accordingly, JobWatch recommends that the FW Act should be amended so as to expressly

recognise the possibility that host organisations will, in certain circumstances, be deemed to be the true employers for unfair dismissal purposes[27].

Recommendation 16: The FW Act should be amended to expressly recognize that in a labour hire scenario (where joint employment doesn't apply), a host organization will, in certain circumstances, be deemed to be the true employer for the purposes of unfair dismissal

Case studies from JobWatch's database highlight the limitations faced by labour hire workers

4.1.1 Case study: Tamara – Factory

Tamara was employed through a labour hire company. She worked for the same host organisation for 7 to 8 years on a full time basis as a picker & packer.

Tamara experienced bullying at the host organisation. After this occurred, she mistakenly filed a General Protections Termination form. She then discovered that this was the wrong form because she was still 'employed' by the labour hire company even though she was no longer working at the host. The labour hire company subsequently found her work at another host organisation however it was only 2 days per week.

4.1.2 Case study: Amit – Bank

Amit was employed by a recruitment agency. He worked at a technology consulting firm which contracted him to a bank.

Whilst working at the bank, Amit was not given access to the information technology system to perform his job. He told the technology consulting firm and the bank that he did not have access. Two days later, the technology consultancy firm dismissed Amit following a false allegation made by an employee of the bank.

The reason given for Amit's dismissal was performance. He was not consulted or given an opportunity to respond. When some of the workers from the bank heard about Amit's dismissal, they complained to the technology consulting firm that Amit's performance issues were due to the fact that he was not given proper access to the bank's information technology system.

Amit filed a General Protections non termination claim against the technology consultancy firm.

4.1.3 Case study: Terry - Property

Terry worked for 6 years under a labour hire arrangement as a Property Services

[27] Parts of this submission were based on JobWatch's Submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work, November 2015, p 14-17 and JobWatch's Submission to the Independent inquiry into insecure work in Australia, January 2012, Item 4.3

Attendant in the Melbourne CBD.

Recently the host organisation where he worked told him that they are going to replace him with a younger permanent worker.

4.1.7 Case study: Jono – TAFE

Jono worked at a TAFE for 1.5 years under a labour hire arrangement.

His employment contract with the labour hire company said that his pay rate could be decreased if government funding was reduced.

Jono was informed that his pay rate would be reduced. He has been asked to respond in writing as to whether he accepts the pay cut.

4.1.8 Case study: Akmal – Abattoir

Akmal was employed by a large labour hire company. He and 64 other workers were told that they had secured work in an abattoir. The workers undertook training and had immunisation shots and many were relocated for work. They were then told that they had to undertake further interviews and only half of them succeeded.

The workers were asked to fly to Sydney to see the labour hire company doctor at their own expense. This money was not refunded. If a worker was found to be injured, the labour hire company terminated their employment.

After taking 2 days of sick leave, Akmal was told by the host organisation that his services were no longer required. 40 other workers were also dismissed.

The host company regularly brought in busloads of foreign workers. When a new bus load arrived, the host organisation dismissed the existing workers on mass.

5. The Extent to Which Companies Avoid Their Obligations Under the *Fair Work Act 2009* by Engaging Workers on Visas

5.1 Temporary Migrant Work Visas

Temporary Work (skilled) (subclass 457) visas (Temporary visas) allow overseas workers to live and work for up to 4 years in Australia. The rationale of this visa subclass is to address skills shortages in Australia. In order to be eligible, overseas workers must be either sponsored by an Australian employer or covered by labour agreements between the Commonwealth and employers that allow employers to recruit overseas workers.

Approved employer sponsors are required to meet certain obligations designed to protect workers from exploitation and to ensure that the program is being used to meet genuine skills shortages. However, in JobWatch's experience, it is not uncommon for employers to act in breach of their obligations regarding worker protections.

JobWatch has found that temporary migrant visa schemes not only, by their very nature,

have the potential to exacerbate the inherent power imbalance between employers and workers but do indeed have this effect. This is reflected through the way that temporary visa holders are treated by their employer sponsors.

For this reason, as will be discussed further below, JobWatch believes that it is absolutely necessary for employer visa sponsors to be more vigilantly monitored and for there to be greater penalties made available to better deter potential offenders.

Recommendation 17: Employer visa sponsors should be more vigilantly monitored by regulators and legislators alike. There has to be to be greater penalties made available to better deter potential offenders.

In JobWatch's experience, many companies avoid their obligations under the FW Act by engaging workers on visas, particularly Temporary visas.

The temporary nature of the migrant worker visa scheme means that 457 visa workers are highly vulnerable. Rogue employers take advantage of the fact that they are unlikely to speak up and enforce their rights for fear of being thrown out of the country. Hence, whilst at first glance it appears that 457 visa holders have the same legal protections as other permanent workers - because they are covered by our workplace laws - access to justice remains a significant hurdle for workers on 457 visas.

In JobWatch's experience, the majority of temporary visa holders who contact the TIS are extremely reluctant to seek recourse under workplace laws for the apparent contravention by their employer of their employment rights. The prime reason behind this reluctance is their fear that if they make a complaint their employer will revoke their sponsorship. In some cases, employers have threatened the visa status of migrant workers to ensure these workers do not make a workplace complaint.

Because of this fear for their visa status, migrant workers suffer lower levels of access to the rights that they technically hold under law. Migrant workers often have limited English language skills and knowledge of and access to the legal system which can make asserting their workplace rights even more difficult.

Additionally, migration law does not guarantee the residency status of a temporary migrant worker who is seeking to challenge their dismissal or make another workplace claim in the context of their employer's revocation of their sponsorship.

5.2 The Employment Relationship

The relationship between workers and employers involves an inherent imbalance of power. This imbalance is a result of the employer's general ability to hire and dismiss workers and to determine employment conditions in circumstances where workers have a very limited ability to enforce statutory minimum entitlements and/or negotiate better conditions. Further, employers are, generally speaking, more economically well-resourced than their workers.

Worker protections and entitlements in the FW Act (such as the National Employment Standards, Unfair Dismissal and General Protections divisions) recognise and aim to ameliorate the unequal nature of the employment relationship.

5.3 The Impact of Temporary Migrant Workers Visa Schemes on the Employment Relationship

The temporary migrant workers scheme by its very nature exacerbates the power imbalance that exists in the employment relationship. This is because the worker's residency status is tied to the ongoing sponsorship by the employer. It therefore adds a further level of domination that employers may and often do wield against workers. Further, the migrant workers who turn to JobWatch for assistance often have limited English language skills and little knowledge of their employment rights, which can further exacerbate their relative powerlessness.

5.4 Case Studies of Exploitation of Temporary Migrant Workers by Employers

JobWatch receives many calls from workers who are on working visas, particularly temporary working visas. These calls have increased significantly as temporary work visas have become more widely used. For example, a manual search of our database indicates that in 2005 only 2 people who called the TIS identified themselves as being on a 457 visa. In 2014, instead, 43 callers disclosed that they were 457 visa holders.
Visa type was added to the JobWatch Database in June 2016. In the four months from 1 July 2016 and 30 October 2016, 15 people identified themselves as being on either a 457 visa or other temporary visa.

Therefore it is very clear from our TIS database that the number of calls relating to temporary work visas is ever increasing.

The following case studies highlight JobWatch's concerns.

5.4.1 Case Study: Preeti – Chef on Visa

Preeti was employed as a chef at a bistro. She was on a 457 visa. Her employer frequently attended work intoxicated and sexually harassed her, such as touching her bottom.

One night, Preeti's employer arrived at her house in an intoxicated state and demanded to be let in. When she refused, he continued to send her text messages asking to come in. She was divorced and was worried that he would come back to her place when she was alone.

She was underpaid and overworked and was not allowed to take sick leave. Despite these conditions, Preeti was reluctant to speak up because she required 2 years of continuous service from her visa sponsor. She had 1 year to go. Her boss said that he would sign off her contract early if she slept with him.

5.4.2 Case Study: Romeo – Painter on Visa

Romeo was on a 457 working visa painting factories for refurbishment. He was paid less than the minimum wage.

Three weeks after commencing with this employer, Romeo's boss asked him to get an ABN to become an independent contractor.

5.4.3 Case Study: Penny – Office Worker on Visa

Penny was an office worker on a 457 working visa. At the office Christmas party, her boss made sexual advances towards her and tried to kiss her. She pushed him away.

When she returned from the Christmas break, her boss started reprimanding her in front of colleagues and she was demoted.

5.4.4 Case Study: Dinh -Cook on Visa

Dinh worked as a cook at a pub under a 457 working visa.

He took 5 days off because he was sick. He notified his employer after seeing his doctor and produced medical certificates for the time he was unwell.

When Dinh returned to work, management notified him that his job was being made redundant. Dinh's colleagues said that they are rehiring. Dinh has 90 days to find another sponsor or he will need to leave the country.

5.4.5 Case Study: Leon – visa

Leon was working under a 457 working visa. His employer underpaid him by $17,000 plus commission in his first year of employment. When he questioned the underpayment, his employer threatened to terminate his employment.

He continued to work with the employer for another 6 months even though he knew that he was being underpaid. He was pressured to drive dangerous cars. He was forced to vary his contract to reduce his pay. His employer argued that his work car and phone was a component of his pay. His employer then made unauthorised deductions from his pay.

5.5 Trends Arising Out of the Case Studies and JobWatch's Recommendations

The above case studies show that the migrant workers covered by temporary working visa arrangements often experience employment issues with greater intensity by virtue of their precarious residency which they view as, and which in fact and law is, reliant on the retention of an employer sponsor.

The following trend areas have been identified:

- Underpayment and/or non-payment of entitlements;
- Unfair dismissal;
- Discrimination;
- Unreasonable requests of workers by employers;
- Work in contravention of visa conditions;
- Harassment of workers by employers;
- Threats of deportation;
- Employer requiring payment for sponsorship.

Temporary migrant workers will often experience a number of these issues simultaneously. However, as discussed further below, they may be hesitant to seek any form of legal recourse.

Additionally, JobWatch is concerned that, temporary visa workers who are dismissed only have 90 days to find a new sponsor or leave the country. This makes it very difficult, if not impossible, for a temporary visa worker to challenge their dismissal via e.g. an unfair dismissal or general protections claim.

JobWatch therefore recommends that temporary migrant workers who lose their sponsorship because they have been dismissed be entitled to an automatic bridging visa covering the period while they are challenging their dismissal (i.e. in an unfair dismissal, general protections or discrimination claim). If workers have to leave the country because of the loss of their visa status, then this causes an additional injustice in that they can't practically enforce their rights.

Recommendation 18: Temporary migrant workers who lose their sponsorship because they have been dismissed should be entitled to an automatic bridging visa covering the period while they are challenging their dismissal.

Further, the remedy of reinstatement of employment is available in both unfair dismissal and general protections but is effectively meaningless unless the employer's sponsorship obligations can also be ordered to be reinstated.

JobWatch also submits that FWC and/or the Federal Court of Australia and the Federal Circuit Court of Australia have the power to order reinstatement of the employer's visa sponsorship obligations because, without this power, the remedy of reinstatement which is available in unfair dismissal and general protections claims is rendered meaningless.

Recommendation 19: The FWC and/or the Federal Court of Australia and the Federal Circuit Court of Australia should have the power to order reinstatement of the employer's visa sponsorship obligations.

Additionally JobWatch recommends that a specific taskforce or other arrangement be set up between the Fair Work Ombudsman and the Department of Immigration and Border Protection to better protect the work and residency rights of temporary migrant visa workers[28].

[28] Parts of this submission were based on JobWatch's Submission to the Senate Education and Employment References Committee on the Impact of Australia's Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders, Item 4.1 (May 2015).

Recommendation 20: A specific task force or other arrangement should be set up between the FWO and the Department of Immigration and Border Protection to better protect the work and residency rights of temporary migrant visa workers.

6. Whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations

JobWatch believes that the National Employment Standards and modern awards act as an appropriate safety net for wages and conditions for national system employees. However, these laws are only as effective as their investigation, prosecution and enforcement. Whilst most employers comply with the law, there will always be some unscrupulous employers who exploit vulnerable and disadvantaged workers by entering into arrangements that avoid their legal obligations and thereby fail to provide employees with minimum wages and conditions. This exploitation applies to many disadvantaged groups in the community including visa workers, which is discussed above.

6.1 Underpayment of Wages

Avoidance of the NES and modern awards remain prevalent in Victorian workplaces. This can clearly be seen in relation to the prevalence of complaints regarding underpayment of wages.

JobWatch has identified the following patterns:

- There remains a prevalent belief among employers and workers that an employee is not governed by an award if they have not signed a physical contract;
- NES/award avoidance is disproportionately common in the hospitality industry among young people, but affects workers across all industries and of all ages;
- Many workers are fully aware that they are being exploited, but feel they cannot come forward due to job security and the fear of losing their job or lack of faith in the system;
- In particular, many workers who have been underpaid are afraid of coming forward because their employer has not paid tax correctly. This fear is exacerbated for workers affected by visa restrictions;
- Workplaces which avoid NES and award entitlements often have other risk factors such as occupational health and safety concerns, for example unsafe work practices or a bullying culture.

Therefore JobWatch recommends that there be a greater emphasis on enforcement of NES and modern award obligations, including proactive public campaigns.

Recommendation 21: There has to be a greater emphasis on enforcement of the NES and modern award obligations, including proactive public campaigns.

Case Studies: Hospitality

6.1.1 Case Study: Juri – Take Away Shop

Juri, who is a teenager, has been working cash-in-hand at a fast food shop for just under six months. Juri's mother recently discovered that Juri was being paid $4 per hour below award rate, and has not received penalty rates or casual loading. When Juri's mother asked the store manager, she was told that there was no minimum amount. Juri was dismissed shortly after.

6.1.2 Case Study: Kyla – Restaurant

Kyla is a permanent resident who works as a waitress. Kyla's employer chiefly hires migrants who speak English as a second language. She is employed as a casual, but is not being paid casual loading. Kyla works Monday-Friday 40 hours per week, but her payslip only shows her as working 20 hours per week. Kyla is not receiving superannuation or penalty rates, and is being unpaid under the award.

6.1.3 Case Study: Liana – Fast Food Truck

Liana and three of her friends were hired to help staff a food truck at a popular music festival. Liana and her friends are all under 18. The truck owner promised to pay them $500 each, and give them time off to enjoy the festival. However, Liana and her friends were expected to be constantly on call. Liana worked a 21 hour shift without a break. After the festival, the truck owner refused to pay them.

6.1.4 Case Study: Erin – Restaurant

Erin has worked as a waitress for six months. Erin was initially covered under the Restaurant Industry Award. However, recent payslips for Erin and her co-workers have shown that they are no longer getting penalty rates. The café owner is now pressuring everyone to sign new contracts.

6.1.5 Case Study: Ayla – Café

Ayla worked at a café. Ayla was hired as a part-timer, but worked full-time hours after her first week. Ayla was paid less than the award rate, and did not receive super or leave entitlements. After working for a month, Ayla asked her employer about when she would receive a payslip. Ayla was dismissed the next day.

Case Studies: Long-Term Arrangements

6.1.6 Case Study: Salim – Trucking

Salim has worked as a truck driver for over five years. Salim never signed a formal contract of employment. He regularly works at least 10 hours of overtime per week. When he asked his employer about the overtime, he was told that he doesn't have an employment contract and thus won't receive overtime. Salim has checked his entitlements with the Fair Work Infoline, but is afraid to pursue the matter further as he cannot afford to lose his job.

6.1.7 Case Study: Lance - Factory

Lance was employed as a supervisor at a factory. Lance was given duties above those which he was paid and trained for. He worked over 100 hours every week, but was not paid overtime rates. Lance discovered that his employer had not paid tax properly on his pay, resulting in Lance being in debt to the ATO. Lance's employer has begun cutting his hours, and is refusing to pay his meal and fuel allowances. Lance believes his employer is trying to push him out.

Case Studies: Contracting Arrangements

6.1.8 Case Study: Jakob – Series of Fixed Term Contracts

Jakob has worked for his employer for two years. Jakob has worked for his employer on a series of year long fixed-term contracts. Jakob has done the same work the entire time, and has been given no indication that he will not be offered another fixed-term contract when his current contract comes to an end. These contracts exclude annual and sick leave, penalty rates, and overtime. Jakob feels this is unfair, but is worried about his job security if he speaks up.

6.1.9 Case Study: Cammy – Sham Contract

Cammy is a recent university graduate who was employed full-time at a small firm in her field. Cammy was paid $90 per day, with no leave entitlements. Cammy never signed a contract of employment or filled out any invoices, but her employer insisted she was a contractor. Cammy was dismissed shortly after asking if she needed to file an invoice.

6.2 Requests for Flexible Working Arrangements Under the FW Act

Despite recent progress in expanding the grounds under which an employee can request a change to their working arrangements if they require flexibility, for example due to being 55 or older or to provide care to a member of their immediate family or household because they are experiencing domestic violence, JobWatch holds the following concerns regarding requests for flexible working arrangements under section 65 of the FW Act.

- The right to request flexible working arrangements only applies to employees with a minimum of 12 months continuous service. Employees with less than 12 months continuous service are not entitled to have their parental responsibilities reasonably accommodated.

- Furthermore, casual employees need to be long term casual employees of the employer immediately before making the request and must also have a reasonable expectation of continuing their employment on a regular and systematic basis[29].

6.2.1 Case Study: Judy - Flexible Work Arrangements for Employees With Less than 12 Months Service

Judy was employed on a permanent full time basis as a manager in a retail outlet. A couple of months after she commenced employment, she asked her employer for flexible working arrangements to accommodate her family responsibilities.

Her employer initially agreed however shortly afterwards he terminated her employment. The reason given for the termination was that he had sold the business however Judy discovered that he had simply replaced her with a new manager who was prepared to work full time hours.

Judy was not paid her final wages, notice of termination or accrued annual leave.

Therefore, JobWatch recommends that the right to request flexible working arrangements be extended to all employees who require flexibility due to the grounds set out in the FW Act (for example being a parent of a child under school age or a carer or having a disability), regardless of their length of continuous service. Alternatively, we recommend that the right to request flexible working arrangements be available to employees who have completed the minimum employment period applicable in the unfair dismissal provisions of the FW Act. That is, 6 months for employees in businesses with 15 or over employees and 12 months for employees in smaller businesses with 14 employees or less.

Recommendations 22: The FW Act should be amended so that the right to request a change to working arrangements be extended to all employees who require flexibility due to the grounds set out in the FW Act, regardless of their length of continuous service. Alternatively, we recommend that the right to request flexible working arrangements be available to employees who have completed the minimum employment period applicable in the unfair dismissal provisions of the FW Act. That is, 6 months for employees in business with 15 or over employees and 12 months for employees in smaller business with 14 employees or less.

[29] Parts of this submission were based on JobWatch's Submission to the Review Panel for the Review of the *Fair Work Act 2009* (Cth)

6.2.2 Reasonable Business Grounds Refusal

From 1 July 2013 section 65 of the FW Act was amended to provide some guidance on the definition of what constitutes 'reasonable business grounds'. The relevant subsections state as follows.

> *(5) The employer may refuse the request only on reasonable business grounds.*
>
> *(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:*
>
> *(a) that the new working arrangements requested by the employee would be too costly for the employer;*
>
> *(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;*
>
> *(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;*
>
> *(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;*
>
> *(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.*
>
> *(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.*

JobWatch notes that the only considerations explicitly listed as being 'reasonable business grounds' are solely from the employer's perspective. The definition is inclusive however and does refer to reasonableness, therefore implying that other considerations are to be taken into account.[30] Despite this, employee considerations are not clearly enunciated and this leaves scope for a narrow interpretation for those so inclined. It sends a message that employee considerations are of secondary importance when an employer assesses whether and how to accommodate an employee's parental responsibility.

JobWatch recommends that the reference to 'reasonable business grounds' be removed and replaced with the lone requirement that a refusal to accommodate an employee's parental responsibilities not be unreasonable in the manner prescribed by the Victorian EO Act (see below).

[30] Chapman, Anna, "Is the right to request flexibility under the Fair Work Act enforceable?", Australian Journal of Labour Law, (2013) 26

Recommendation 23: The FW Act should be amended to remove the reference to 'reasonable business grounds'. This should be replaced with the lone requirement that a refusal to accommodate an employee's parental responsibilities not be unreasonable in the manner prescribed by the *Equal Opportunity Act 2010* (Vic).

6.2.3 Lack of Enforcement Rights

The lack of enforcement rights (currently section 65 is not a civil remedy provision) means that, in practice, an employer need not genuinely consider a request for flexible working arrangements and can make a decision based on unreasonable grounds. Combined, these issues effectively render the right to request flexible working arrangements meaningless.

Therefore JobWatch recommends that the right to request flexible working arrangements be made a civil remedy provision so that it is enforceable.

Recommendation 24: The FW Act should be amended to make the right to flexible working arrangement a civil remedy provision to ensure its enforceability.

6.2.4 Case Study: Katie - Refusal of Flexible Work Arrangements

Katie works on a casual full time basis as a console operator at a service station. She is a single parent and her child is in day care when she is at work. Katie's child care provider is closed over the Christmas period and as a result she is not able to work because she has to look after her son. The employer has told Katie that if she isn't available on a full-time basis over the Christmas period she is of no use to him and she won't be getting offered shifts in the future.

The employee's right to request flexible working arrangements under section 65 of the FW Act is not a civil remedy provision under Part 4(1). This essentially means that the protection has no effect because neither an individual nor the FWO is able to commence proceedings in relation to a contravention or seek a civil penalty against the employer.

It is JobWatch's understanding that the FWO does not formally investigate an alleged contravention of section 65 of the FW Act, except possibly where an employer has not provided a written response within 21 days. In reality, even if a contravention letter or compliance notice is issued, the FWO is unable to escalate the matter further where an employer does not respond or take steps to comply with the FW Act.

In order to strengthen the FW Act's flexible working arrangements provisions, JobWatch recommends that the Vic EO Act and the United Kingdom's Employment Act be used as models upon which to base change. Excerpts of these Acts are set out below.

6.2.5 *Equal Opportunity Act 2010 (Vic)*

Sections 17 and 19 of the Vic EO Act provide good examples of a legislative obligation on employers to reasonably accommodate the parental / carer responsibilities of employees (and also of those whom are offered employment).

Section 19 of the Vic EO Act states as follows:

> *"19 Employer must accommodate employee's responsibilities as parent or carer*
>
> *(1) An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.*
>
> *Example:*
>
> *An employer may be able to accommodate an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or have a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that the employee can attend.*
>
> *(2) In determining whether an employer unreasonably refuses to accommodate the responsibilities that an employee has as a parent or carer, all relevant facts and circumstances must be considered, including:-*
>
> *(a) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and*
>
> *(b) the nature of the employee's role; and*
>
> *(c) the nature of the arrangements required to accommodate those responsibilities; and*
>
> *(d) the financial circumstances of the employer; and*
>
> *(e) the size and nature of the workplace and the employer's business; and*
>
> *(f) the effect on the workplace and the employer's business of accommodating those responsibilities, including:-*
>
> *(i) the financial impact of doing so;*
>
> *(ii) the number of persons who would benefit from or be disadvantaged by doing so;*
>
> *(iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and*

(g) the consequences for the employer of making such accommodation; and

(h) the consequences for the employee of not making such accommodation."

Under the Vic EO Act, a complaint in relation to an employer's refusal to accommodate parental responsibilities can be made to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) (who can hold a voluntary conciliation) and/or an application can be made to the Victorian Civil and Administrative Tribunal (VCAT) for determination of the matter.

JobWatch acknowledges that section 66 of the FW Act states that State and Territory laws are not excluded by the application of the FW Act but submits that section 65 should mirror this legislation which provides an actionable right rather than a relatively toothless right to request and also places the onus on the employer to accommodate the request.

6.2.6 *Employment Rights Act 1996* (United Kingdom)

JobWatch believes that the UK Act also provides a useful model for the right to request flexible working arrangements.

Section 80F of the UK Act provides a statutory right to request a change to certain terms and conditions of employment for any employee with 26 weeks' continuous service who:

(a) has/expects to have parental responsibilities of a child under 17;

(b) has/expects to have parental responsibilities of a disabled child under 18 (who receives a Disability Living Allowance);

(c) is the parent/guardian/special guardian/foster parent/private foster carer of the child or a person who has been granted a residence order in respect of the child or is the spouse, partner or civil partner of the parent/guardian/special guardian/foster parent/private foster carer and are applying to care for the child; and

(d) is a carer who cares, or expects to be caring, for an adult who is a spouse, partner, civil partner or relative; or although not a relation, lives at the same address.

Such a request can be made every 12 months and an employer has a legal obligation to consider the request, which can only be refused on legitimate business grounds.[31] An employee can appeal the employer's decision to refuse a request (within 14 days) and if the matter remains unresolved an employee can use the Advisory, Conciliation and Arbitration Service (ACAS), a voluntary arbitration scheme for the resolution of flexible working disputes. Where an employee believes the employer's decision to reject their request was based on incorrect facts, didn't follow the correct procedure or didn't provide an adequate explanation of their refusal, s/he can make a complaint to the Employment Tribunal.

[31] www.direct.gov.uk, Who can request flexible working? UK Government, p. 2

Recommendation 25: The FW Act should be amended to strengthen the FW Act's flexible working arrangements provisions by using the Victorian EO Act 2010 and the United Kingdom's *Employment Rights Act 1996* as a model for improvement. Specifically section 65 of the FW Act should be changed to mirror the flexible working arrangement provisions in the aforementioned Acts.

6.3 Right to Request Extension of Unpaid Parental Leave Under FW Act

JobWatch views as problematic the fact that the employee's right to apply for an extension of unpaid parental leave under section 76 of the FW Act is not a civil remedy provision under Part 4(1), meaning that this section is not enforceable. This essentially means that the protection has no effect because an individual or the FWO is not able to commence proceedings in relation to a contravention or seek a civil penalty against the employer. Further, as stated above in relation to requests for flexible work arrangements, it is JobWatch's understanding that the FWO does not formally investigate an alleged contravention of this section. The reality is that, even if a contravention letter or compliance notice is issued, the FWO cannot take any further action if the employer does not respond or take steps to comply with the FW Act.

Therefore, JobWatch recommends that the right to apply for an extension of unpaid parental leave be made a civil remedy provision so that it is enforceable.

Recommendation 26: The FW Act should be amended to make the right to apply for extension of unpaid parental leave, a civil remedy provision. This will go some way to ensure the enforceability of this right.

7. The Extent to Which Companies Enter into Arrangements to Avoid their Obligations Under the NES and Modern Awards

7. 1 Sham Contracting and the Use of 'Phoenix' Corporate Structures[32]

In JobWatch's experience, unscrupulous employers use sham contracting and phoenix structures as a means to exploit vulnerable workers.

7.2 Sham Contracting

In JobWatch's experience, the problem of 'sham contracting' is widespread, i.e. workers being hired as 'independent contractors' despite being, for all intents and purposes, employees. If hired as an independent contractor, the worker does not have the safety net of the workplace relations system to protect their rights. For example, they will not be entitled to

[32] This submission was made in JobWatch's Submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work, November 2015, p32-33

the relevant minimum wage or eligible for unfair dismissal protection. Often, the worker will be under the impression that they are an employee until a problem arises with their employment (such as an unfair dismissal) and they are informed that they were, in fact, an independent contractor[33]. For example:

7.2.1 Case study: John – Sham Contracting

John responded to an online advertisement for a painting job. He received the job and worked his first day. The next day, he was told to remove his safety boot as it was making the tiles dirty. After doing this, he fell from a ladder and broke his toe. John wanted to make a WorkCover claim, but his employer refused to tell him the business's company name or their ABN. The employer also refused to pay John for the work he had already completed. The employer informed John that he was an independent contractor and therefore needed to provide his own insurance. The employer had asked for John's ABN, but only after he had had his accident.

In JobWatch's experience, vulnerable workers, such as recently arrived immigrants with minimal English skills, are especially likely to be exploited in this way. This may be because they do not understand the difference between the rights of an independent contractor and those of an employee, or because the job is offered as an independent contracting role on a 'take it or leave it' basis.

7.3 Phoenix Corporate Structures

The use of phoenix structures involves the "*deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities* for the purpose of evading legal responsibilities.[34] It also involves the intentional transfer of assets from an indebted company to a new company for the purpose of avoiding paying tax, creditors or employee entitlements.[35]

Factors which allow these situations to go unchecked include the inequality of bargaining power and lack of knowledge about workers' legal rights. In JobWatch's experience, vulnerable workers are susceptible to exploitation by disreputable operators.[36]

7.3.1 The Fair Entitlements Guarantee

The Fair Entitlements Guarantee (FEG) is a scheme set up by the Australian government which provides financial assistance to eligible employees to cover some unpaid employment entitlements in the event they lose their job due to bankruptcy or liquidation of their employer. The scheme provides a legislation safety net. Financial assistance can be provided for up to 13 weeks unpaid wages, annual leave, long service leave, payment in lieu of notice (up to 5 weeks) and redundancy pay (up to 4 weeks per full year of service).

However the limitation of the FEG scheme is that unpaid wages, payment in lieu of notice and redundancy pay is capped. Additionally, the scheme doesn't cover all employment entitlements such as unpaid superannuation.

[33] This submission was made in JobWatch's Submission to the Productivity Commission's Workplace Relations Framework Inquiry, March 2015, p17-18
[34] Australian Government (Treasury) 2009, Action against Fraudulent Phoenix Activity: Proposals Paper p1
[35] ASIC, http://asic.gov/for-business/your-business/small-business/compliance-for-small-business/small-business-illegal-phoenix-activity/
[36] These submissions were made in JobWatch's submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work, November 2015 p32 and 33

7.3.2 Case study: George – phoenix corporate structure

The company that George worked for went into liquidation. This was the third time this had happened. The director of the company had a cycle of setting up a company, liquidating it and then setting up another company.
George was also owed unpaid superannuation. George was unsure whether his past period of service would be taken into account for the purpose of the Fair Entitlements Guarantee scheme.

7.3.3 Case study: Mario – phoenix corporate structure

Mario worked as a Panel Beater. He was engaged as an independent contractor.
The company went into liquidation and owed Mario $8,000. Mario knows that the business is trading as a different entity.

As an independent contractor, Mario is not eligible for the Fair Entitlements Guarantee. Therefore he will need to stand in line with other creditors to recover payment.

JobWatch recommends that there be a higher level of regulation surrounding independent contracting and in order for the Fair Work Ombudsman etc to better prosecute sham contracting, there should be a statutory definition of the term 'independent contractor' in the FW Act.

Recommendation 27: There must be a higher level of regulation surrounding independent contracting in order for the FWO and other regulatory bodies to better prosecute sham contracting. There should be a statutory definition of the term 'independent contractor' in the FW Act.

JobWatch also recommends that the Commonwealth government consider or continue to consider legislation similar to the draft Corporations Amendment (Similar Names) Bill 2012 which proposed amendments to the *Corporations Act 2001* (Cth) that would, in certain circumstances, impose personal liability on company directors for debts incurred by 'phoenix' companies.

Recommendation 28: The Commonwealth government should consider or continue to consider legislation similar to the draft Corporations Amendment (Similar Names) Bill 2012 which proposed amendments to the Corporations Act 2001 (Cth) that would, in certain circumstances, impose personal liability on company directors for debts incurred by 'phoenix' companies.

8. Legacy Issues Relating to Work Choices and Australian Workplace Agreements

JobWatch still receives a small amount of telephone calls from workers who are covered by Australian Workplace Agreements (AWAs). The FW Act prevented the creation of new AWAs because they often undercut minimum employee entitlements under modern awards and the National Employment Standards. However, these agreements continue to have a hangover effect in some workplaces.

In the period of 1 January 2015 to 1 October 2016, 48 callers identified themselves as being covered by an AWA (pre July 2009) and 10 callers believed they were covered by an AWA (pre March 2006). JobWatch has found that the continued existence of AWAs not only creates confusion amongst employees as to their rights and entitlements, but undermines basic minimum employment entitlements. Despite the fact that many AWAs have now expired, they continue to be used and enforced in some workplaces. JobWatch believes that the continued presence of AWAs in workplaces is disadvantageous and detrimental for employees.

JobWatch is concerned that most employees who are currently on AWAs will not be aware of their entitlement to unilaterally terminate their AWA after the nominal expiry dated has passed. These employees are likely to continue on their AWA long after they could have terminated their individual agreements and reverted back to the relevant award or workplace instrument. This means that these employees will be missing out on what could be thousands of dollars of wages and entitlements.

JobWatch submits that this situation could be avoided if the FW Act required the following:

(a) that the FWC is to contact each and every employee covered by an AWA on or before the nominal expiry date of their individual agreement and inform them that they have the right to unilaterally terminate their AWA; and

(b) that all AWAs automatically terminate on a certain date regardless of their expiry date[37].

Recommendation 29: The FWC/FWO should advise all employees on AWAs of their right to unilaterally terminate their individual agreements after the agreements' nominal expiry date.

Recommendation 30: All AWAs should automatically terminate on a certain date (e.g. 1 January 2017).

[37] Parts of this submission are based on JobWatch's Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Bill 2008, January 2009, p 50

8.1 Case study: Linda – Customer service officer

Linda was employed under an AWA for 6 to 10 years. Her AWA entitled her to a redundancy payment, which her employer refused to pay her when her position became redundant. After making a complaint to the FWO to try to recover her redundancy payment, Linda had to pursue the matter in the Federal Circuit Court.

9. Any other related matters.

9.1 Impact of casualisation on the workforce

JobWatch believes that historical concepts of the definition of a casual employee must be revised. In JobWatch's experience, problematic aspects of casualisation of the workforce include the following:

- the vulnerability of casual workers to mistreatment;
- the powerlessness of casual workers in the workforce; and
- workers being employed as casuals when the employer intends to engage them as regular and systematic workers.

A snapshot of casual workers

9.1.1 Case Study: Yulie – casual on a series of fixed term contracts

Yulie is a nurse. She has worked for the same employer for the last 14 years on a series of short-term casual contracts.

9.1.2 Case Study: Marko – casual for eight years

Marko is a truck driver. He has worked for the same employer for eight years. His employer has a waiting list of employees who wish to become permanent.

9.1.3 Case Study: David – casual for over ten years

David is a bus driver. He has worked for the same employer and driving the same route for over ten years.

9.1.4 Saskia – full time casual for seven years

Saskia is a factory worker. She has worked Monday-Friday full-time hours in the same role for seven years.

9.1.5 Anne – full time casual for two years

Anne is an assistant at a nursery. She has worked regular full-time hours for two years. She works extra hours during the summer months.

9.1.6 The Insecurity of Casual Employment

Under section 384 the FW Act, a period of casual employment is not counted as part of a term of continuous service for the purposes of unfair dismissal unless the worker is employed on a regular and systematic basis, and with an expectation of ongoing work.

JobWatch believes that the requirement of proving that a casual has worked on a regular and systematic basis creates an unnecessary hurdle for an employee seeking redress, and a problematic uncertainty for an employer concerned about a claim.

JobWatch submits that unfair dismissal should be accessible to all casual employees. Unfair dismissal has a minimum term of continuous service of six months, or one year for small business employees. A casual who has been continuously engaged for over six months may be said to have an expectation of ongoing work.

Therefore JobWatch recommends that section 384 of the FW Act be amended to recognise all casual service as service for unfair dismissal.

Recommendation 31: Section 384 of the FW Act should be amended to recognise all casual service as service for the purpose of eligibility for unfair dismissal.

Additionally, JobWatch recommends that there be a mechanism for conversion from casual to permanent employment for employees with a certain term of service, as used to be the case under previous awards.

Recommendation 32: The FW Act should be amended to include a mechanism for conversion from casual to permanent employment for employees with a certain period of service

Further, casuals who have been employed on a long term basis (such as at least one year) should also be entitled to notice of termination and redundancy pay, and in this respect should be treated in the same way as a permanent employee.

Recommendation 33: The FW Act should be amended to make sure that casuals who have been employed on a long term basis (such as at least one year) be entitled to notice of termination and redundancy pay.

Alternatively, the FW Act's notice of termination and redundancy pay provisions in the NES should be amended to codify the recent FWC Full Bench decision in *Automotive, Food,*

Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) v Donau Pty Ltd [2016] FWCFB 3075 where a period of casual service was held to count towards the employees' total length of service for the calculation of notice and redundancy pay entitlements where the employees were permanent employees at the date of termination.

Recommendation 34: The FW Act's notice of termination and redundancy pay provisions in the NES should be amended to take into account an employee's prior period of casual service if their job as a permanent employee is made redundant.

Conclusion

JobWatch believes that despite seemingly strong protections that exist for employees under the FW Act, these protections are not as effective. Many companies are able to avoid their obligations under the FW Act, for example by engaging in labour hire, sham contracting or phoenexing arrangements or engaging workers on visas, which undermines workers' pay and conditions. Therefore JobWatch submits that as per the recommendations set out in this Submission, the FW Act needs to be amended to strengthen employee and other workers' protections by ensuring that companies are unable to evade their legal responsibilities.

Thank you for considering our submission. We would welcome the opportunity to discuss any aspect of this submission further.

Please contact Ian Scott on 9662 9458 if you have any queries.

Yours sincerely,

Ian Scott
Per:
Job Watch Inc